83 122

Office - Supreme Court, U.S.
FILED
JUL 25 1983
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HYDROKINETICS, INC., *Petitioner*

v.

ALASKA MECHANICAL, INC. *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION

DONALD E. HERRMANN
BARBARA P. NEELY
HUDSON, KELTNER, SMITH & CUNNINGHAM

2300 Texas American Bank Bldg.
Fort Worth, Texas 76102
Telephone: (817) 336-2300

Attorneys for Petitioner

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

I.

QUESTION PRESENTED

The error of the United States Court of Appeals for the Fifth Circuit in affirming the order of the United States District Court for the Northern District of Texas, Fort Worth Division, and in holding that the minimum contacts prong of the Fifth Circuit's two prong due process test for the exercise of *in personam* jurisdiction over nonresident defendants was not satisfied when the Court of Appeals departed from the established test by giving substantial weight to a contractual choice of law provision.

II.

LIST OF PARTIES

The caption of this case contains the names of all parties in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

Page

I. QUESTION PRESENTED i

II. LIST OF PARTIES i

III. REPORTS OF THE OPINION OF THE COURTS BELOW 1

IV. JURISDICTION 2

V. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

VI. STATEMENT OF THE CASE 3

VII. EXISTENCE OF PROPER JURISDICTION BELOW .. 5

VIII. REASONS FOR GRANTING WRIT 5

A. MINIMUM CONTACTS EXIST 6

B. THE FIFTH CIRCUIT HAS GIVEN IMPROPER WEIGHT TO THE CHOICE OF LAW PROVISION 8

C. THE HOLDING OF THE FIFTH CIRCUIT CREATES AN UNACCEPTABLE DILEMMA IN INTERSTATE BUSINESS TRANSACTIONS 12

IX. CONCLUSION 13

APPENDIX "A" A-1

APPENDIX "B" A-3

APPENDIX "C" A-17

APPENDIX "D" A-18

APPENDIX "E" A-19

TABLE OF AUTHORITIES

Case	Page
Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965)	10
Alchemie International, Inc. v. Metal World, Inc., 523 F.Supp. 1039, 1049 (D.N.J. 1981)	7
Artisans Development v. Mountain States Development Corp., 402 F.Supp. 1312 (S.D. Ohio 1975)	11
Atlantic Richfield Co. v. Stearnes-Roger, Inc., 379 F.Supp. 869 (E.D. Pa. 1974)	11
Baird v. Bell Helicopter Textron, 491 F.Supp. 1129 (N.D. Tex. 1980)	7
Breindel v. Levitt & Sons, Inc., 294 F.Supp. 42 (E.D.N.Y. 1968)	11
Communications Equipment and Contracting Co., Inc. v. Municipality of Anchorage, Alaska, 498 F.Supp. 632 (M.D.Ala. 1980)	6, 7
Galgay v. Bulletin Co., Inc., 504 F.2d 1062, 1066 (2d Cir. 1974)	10
Gardner Engineering Corp. v. Page Engineering Co., 484 F.2d 27, 31 (8th Cir. 1973)	12
Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 381 n.4 (5th Cir. 1980)	9
Hanson v. Denckla, 357 U.S. 235, 254 (1958)	9
Hess Oil Virgin Islands Corp. v. U.O.P., Inc., 447 F.Supp. 381 (N.D. Okla. 1978)	11
Hydrokinetics, Inc. vs. Alaska Mechanical, Inc., 700 F.2d 1026, 1030 n.6 (5th Cir. 1983)	14
In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 235 (6th Cir. 1972)	7, 14
Iowa Electric Light and Power v. Atlas Corp., 603 F.2d 1301 (8th Cir. 1979)	10

TABLE OF AUTHORITIES Continued

Case	Page
Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980) (White, J. dissenting, Powel, J., joined)	13, 14
Marathon Metallic Building Co. v. Mountain Empire Construction Co., 653 F.2d 921, 923 (5th Cir. 1981)	9
McGee v. International Life Insurance Co. 335 U.S. 220 (1957)	6, 7
Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982)	14
M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)	10
Northern Trust Co. v. Randolph C. Dillon, Inc., 558 F.Supp. 1118 (N.D. Ill. 1983)	10
Owen of Georgia, Inc. v. Blitman, 462 F.2d 603 (5th Cir. 1972)	11
Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974)	11
Rosen v. Solomon, 374 F.Supp. 915, 920 (E.D. Pa. 1974), *aff'd* 523 F.2d 1051 (3rd Cir. 1975)	12
Shaffer v. Heitner, 436 U.S. 186, 215 (1977)	9, 12
Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 382 (6th Cir. 1968)	10
Southwest Offset, Inc. v. Hudco Publishing Co., Inc., 622 F.2d 149 (5th Cir. 1980)	6, 7, 11
Standard Leasing Company v. Performance Systems, Inc., 321 F.Supp. 977 (N.D. Tex. 1971)	7
Telco Leasing, Inc. v. Marshall County Hospital, 586 F.2d 49, 51 (7th Cir. 1978)	10
Uvalde Rock Asphalt Co. v. Consolidated Carpet Corp., 457 S.W.2d 649 (Tex.Civ.App.—Beaumont, writ ref'd n.r.e.)	7

TABLE OF AUTHORITIES Continued

Case	Page
Wisconsin Electric Mfg. Co., Inc. vs. Pennant Products, Inc., 619 F.2d 676, 678 (7th Cir. 1980)	8, 13
World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	10
U.S. Const. amends. 5 and 14	2
28 U.S.C. §1254 (1) (June 25, 1948, C.646, 62 Stat. 928)	4
28 U.S.C. §1332 (as amended October 21, 1976, Pub.L. 94-584, §3, 90 Stat. 2891)	5

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HYDROKINETICS, INC., *Petitioner*

v.

ALASKA MECHANICAL, INC., *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To The Honorable Chief Justice and the Associate Justices of the Supreme Court:

Hydrokinetics, Inc., Petitioner herein, prays that a Writ of Certiorari be issued to review the final decree of the United States Court of Appeals for the Fifth Circuit, which affirmed the order of dismissal entered in this cause by the United States District Court for the Northern District of Texas, Fort Worth Division.

III.

REPORTS OF THE OPINION OF THE COURTS BELOW

The United States District Court for the Northern District of Texas, Fort Worth Division on motion of Respondent, entered an order dismissing Petitioner's Original Complaint for lack of *in personam* jurisdiction. The District Court's order is attached hereto as Appendix "A" and is not reported.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's order. The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Appendix "B" and is reported in 700 F.2d at page 1026. The order of the Court of Appeals for the Fifth Circuit denying the Motion for Rehearing of Petitioner is attached hereto as Appendix "C" and is not reported.

IV.

JURISDICTION

1. The final judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, was entered on February 11, 1982. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on March 21, 1983. Petitioner's Motion for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit by order entered April 27, 1983.

2. Jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit is conferred on this Court by 28 U.S.C. §1254 (1) (June 25, 1948, C646, 62 Stat. 928).

V.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the United States Constitution which are involved are the fifth and fourteenth amendments. The text of the constitutional amendments are reprinted in full in Appendix "D" attached hereto.

VI.

STATEMENT OF THE CASE

This is a suit for breach of contract originally filed by Petitioner, Hydrokinetics, Inc., against the Respondent, Alaska Mechanical, Inc., in the United States District Court for the Northern District of Texas, Fort Worth Division. Respondent filed a motion to dismiss the complaint for lack of jurisdiction over the person. Respondent's motion was granted, without hearing, on February 11, 1982. Petitioner appealed the decision to the United States Court of Appeals for the Fifth Circuit, which has affirmed the order of the District Court by a 2-1 decision. Judge Wisdom authored the majority opinion, joined by Judge Reavely. Judge Tate filed a dissenting opinion.

The dispute arises from an interstate purchase/sale transaction, and the facts of the case are not complex. An original purchase order contract was prepared by Respondent, an Alaskan corporation, and transmitted from Alaska to Petitioner, a Texas corporation, in Fort Worth, Texas, for review and acceptance. The purchase order was for five waste heat recovery silencer units (a heat exchanger and muffler combination) to be specially manufactured in Texas and purchased by Respondent from Petitioner.

Respondent's original purchase order proposal was not accepted by Petitioner, and negotiations concerning the contract terms ensued via telex, telephone and letter. During these negotiations, representatives of Respondent traveled to Texas from Alaska to inspect Petitioner's facilities and to personally negotiate the final contract details. After two months of extensive contract negotiations, a final purchase order agreement was accepted and executed by Petitioner in Fort Worth, Texas. A copy of the contract is attached as Appendix "E." The purchase order contract was concluded on the printed form of Respondent and contains a choice of law pro-

vision stating that the agreement is to be construed according to Alaska law.

Following execution of the contract substantial communications continued between the parties with regard to performance. Many of these communications originated in Alaska and were transmitted to Petitioner in Texas. On April 1, 1980 representatives of Respondent traveled to Texas a second time to meet with representatives of Petitioner for the purpose of discussing the performance under the contract.

The five waste heat recovery silencer units ordered from Petitioner were manufactured in Texas. Substantial payments toward the contract price were made by Respondent to Petitioner in Fort Worth, Texas, but the entire price was not paid.

On October and November, 1979 Petitioner shipped the manufactured goods to Seattle, Washington in accordance with the contract terms. On February 5, 1981 Respondent notified Petitioner that the goods were being rejected as unsuitable. Respondent did not return the goods to Petitioner and did not pay the full contract price. This action was filed by Petitioner to recover the unpaid portion of the contract price.

The District Court dismissed Petitioner's complaint for lack of *in personam* jurisdiction over Respondent. The Court specifically acknowledged that Petitioner's *prima facie* showing on the facts of jurisdiction were sufficient to satisfy the Texas long-arm statute, but held that the exercise of jurisdiction under state law would not comport with basic due process requirements of the United States Constitution. In its order, the District Court noted that the contract was to be governed by Alaska law.

The Court of Appeals for the Fifth Circuit affirmed the District Court's order, finding that the totality of facts in the case as set forth hereinabove did not support the necessary inference that Respondent purposefully availed itself of the benefits and protections of Texas law.

VII.

EXISTENCE OF PROPER JURISDICTION BELOW

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1332 (as amended October 21, 1976, Pub.L. 94-584, §3, 90 Stat. 2891).

VIII.

REASONS FOR GRANTING WRIT

Writ of Certiorari should be granted in this case because the result obtained in the District Court and Fifth Circuit Court of Appeals is in direct conflict with the prior decisions of this Court and those of other federal circuit courts of appeal. If allowed by this Court to stand as precedent, the erroneous result will further muddy the already murky waters surrounding *in personam* jurisdiction analyses.

Reduced to essence, the result of lower court decisions in this case is that Petitioner, a Texas corporation, may not sue in Texas to recover money due from a nonresident corporation under a written contract made and performed in Texas. Petitioner submits that this conclusion is inexplicable under controlling authorities and unacceptable in modern interstate commercial transactions.

The pertinent and uncontroverted jurisdictional facts of this case are that Respondent agreed to purchase and Petitioner agreed to sell certain goods to be specially manufactured in Texas. The agreement was evidenced by a written purchase order prepared by Respondent. Petitioner accepted and executed the purchase order in Texas. Prior to conclusion of the written agreement, the parties had exchanged extensive communications originating both in Texas and Alaska. Respondent's representatives had even traveled to Texas to "close" the deal. The goods were ultimately manufactured in Texas and shipped to Seattle, Washington under the terms of the pur-

chase order agreement. Respondent paid substantially all the purchase price to Petitioner in Texas. However, after a dispute arose concerning the goods, Respondent refused to pay the final $10,000.00 due to Petitioner under the contract. Petitioner filed suit in Texas to collect the unpaid amount.

A. Minimum contacts exist

The foregoing summary of jurisdictional facts shows conclusively that the transaction has substantial connection with Texas. Further, a comparison of the particular facts of this case with those identifiable in prior decisions of this Court and other federal courts shows substantial support for Petitioner's contention that Respondent engaged in sufficient contacts with the State of Texas to satisfy due process requirements and allow the proper exercise of *in personam* jurisdiction by Texas courts. In fact, the authorities suggest that many of the jurisdictional contacts existing in the instant case are singularly sufficient to satisfy the minimum contact and fairness requirements for the exercise of *in personam* jurisdiction.

The act of causing a contract to be sent into the forum state for execution has been held to constitute a substantial contact that satisfies all due process concerns. In the landmark case of *McGee v. International Life Insurance Co.*, 335 U.S. 220 (1957) it was held that the nonresident's mailing of a reinsurance contract in the forum state constituted sufficient minimum contact to satisfy due process requirements. Such a contact, plus many more, exists in the instant case.

The act of engaging in a contractual relationship that causes business activity to occur in the forum state has also been held to constitute a sufficient connection. In the cases of *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 622 F.2d 149 (5th Cir. 1980) and *Communications Equipment and Contracting Co., Inc. v. Municipality of Anchorage, Alaska*, 498 F.Supp. 632 (M.D.Ala. 1980) *in personam* jurisdiction was sustained as to nonresidents that contracted for goods to be produced or

manufactured in the forum state. In *Baird v. Bell Helicopter Textron*, 491 F.Supp. 1129 (N.D. Tex. 1980) it was held that a nonresident's purchase of equipment from Texas was sufficient purposeful activity to allow the exercise of *in personam* jurisdiction.

Numerous decisions have concluded that payment for goods or services made to the resident in the forum state should be considered an important fact lending support to a finding of minimum contacts. *Uvalde Rock Asphalt Co. v. Consolidated Carpet Corp.*, 457 S.W.2d 649 (Tex.Civ.App. — Beaumont 1980, writ ref'd n.r.e.); *Standard Leasing Company v. Performance Systems, Inc.*, 321 F.Supp. 977 (N.D. Tex. 1971); *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, *supra* and *Communication Equipment and Contracting Co., Inc. v. Municipality of Anchorage, Alaska*, *supra*.

Similar weight has been given to the existence of communications by telephone, telex or letter attendant to the solicitation, negotiation and execution of a contract. Thus, in *Alchemie International, Inc. v. Metal World, Inc.*, 523 F.Supp. 1039, 1049 (D.N.J. 1981) it was stated that, in the context of a commercial contract, mail and telephone communications are to be counted as significant contacts, thus acknowledging the dominant role of such communications in modern business practice. *See also In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972), and *McGee v. International Life Ins. Co.*, *supra*.

In the case at bar, the communications did not stop with long-distance communications. In addition to the telephone conversations and correspondence, officers of Respondent traveled to Texas prior to the execution of the contract. The admitted purpose of this visit was to permit Respondent the opportunity to inspect Petitioner's facilities and to allow personal negotiation of the final contract terms. The facts of *Communication Equipment and Contracting Co., Inc. v. Municipality of Anchorage, Alaska*, *supra* at 635, where *in*

personam jurisdiction was upheld, are strikingly similar and indistinguishable.

Also noteworthy is the case of *Wisconsin Electric Mfg. Co., Inc. v. Pennant Products, Inc.*, 619 F.2d 676, 678 (7th Cir. 1980) where the court determined that visits to the forum state by agents of the nonresident defendant buyer were significant contacts which satisfied the requirement that a defendant conduct activities in the forum state. There as in the instant case, officers of the nonresident defendant twice journeyed to the forum state and entered into negotiations leading to the execution of a contract, in addition to making numerous telephone and mail contacts with the forum state.

In summary on this point, it is mere fiction to suggest that the nonresident Respondent, which (a) sent its agents to Texas to conclude the deal, (b) accepted the goods it knew to be manufactured in Texas and (c) made part payment in Texas, could not reasonably anticipate being required to answer in Texas courts for its failure to make full and final payment. The Fifth Circuit's willingness to engage in this fiction should not be allowed to stand as precedent.

B. The Fifth Circuit has given improper weight to the choice of law provision

While it is clear that Petitioner, under prevailing authorities, has made a strong showing of substantial minimum contacts and purposeful availment on the part of the Respondent in this case, nevertheless the District Court and Fifth Circuit have held that the minimum contact prong of the due process test was not satisfied. These holdings result from the decision of those courts to give unprecedented and controlling weight to a printed form choice of law provision contained in the purchase order contract. The majority opinion in the Fifth Circuit, authored by Judge Wisdom, holds that existence of the choice of law provision diminishes or negates the significance of the other contacts which have traditionally been given con-

trolling weight in the due process analysis. That holding is an erroneous and unacceptable deviation from existing authorities.

Although the Fifth Circuit has previously decided personal jurisdiction cases involving contractual choice of law provisions, none of the previous Fifth Circuit opinions has suggested that a choice of law provision might have jurisdictional implications in determining the due process issue. *See Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921, 923 (5th Cir. 1981), and *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 381 n.4 (5th Cir. 1980). Thus, the opinion of the Fifth Circuit in this case represents a new and unpredictable divergence from that Court's previous path. It is peculiar that this new approach has been taken in a case where there is no suggestion that the state laws differ, and they probably do not since both Texas and Alaska have adopted the Uniform Commercial Code.

Moreover, the Fifth Circuit's decision in this case to give controlling weight to a choice of law provision is inconsistent with positions previously enunciated by this Court. In the cases of *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) and *Shaffer v. Heitner*, 436 U.S. 186, 215 (1977), it was made clear that factors important to the choice of substantive law should be differentiated from those which control the exercise of personal jurisdiction over a nonresident. Thus, this Court has rejected the proposition that application of the forum state's law carries with it personal jurisdiction over the parties. If a choice of law provision does not support the inference that a nonresident has submitted to *in personam* jurisdiction, how can the converse be true? That is, how can it be said that such a provision does support an inference that the nonresident defendant has not purposefully availed itself of the benefits of the forum state.

The Fifth Circuit's decision is also in direct conflict with decisions of other federal courts of appeal, which have specif-

ically rejected the contention that a choice of law provision should be given effect in jurisdictional determinations. Facing the choice of law issue squarely, the Second Circuit has ruled that choice of law provisions do not have jurisdictional implications. *Galgay v. Bulletin Co., Inc.*, 504 F.2d 1062, 1066 (2d Cir. 1974); *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583 (2d Cir. 1965). Courts of other circuits have indicated they would reach similar conclusions. *Iowa Electric Light and Power v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979); *Telco Leasing, Inc. v. Marshall County Hospital*, 586 F.2d 49, 51 (7th Cir. 1978), and *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 382 (6th Cir. 1968).

The foregoing authorities correctly distinguish choice of law from choice of forum, and recognize that choice of law provisions serve entirely different purposes than do choice of forum provisions. Contracting parties use choice of law provisions to remove uncertainty that may exist about the legal effect of language used in a document. When put into the context of litigation, the choice of law provision is a tool designed to affect the outcome of a controversy — it does not support an inference that the parties selected or preferred a particular forum for the litigation. If anything, the inclusion of a choice of law provision suggests that the Respondent foresaw its conduct would have effects beyond the boundaries of its home state and anticipated that it might be hauled into courts of other states. Thus, under the foreseeability test espoused in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the choice of law provision supports the exercise of *in personam* jurisdiction in this case.

It should be mentioned that the choice of law provision accepted by the parties to this case was not coupled with a forum selection clause. *See generally M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Northern Trust Co. v. Randolph C. Dillon, Inc.*, 558 F.Supp. 1118 (N.D. Ill. 1983). Further, it is noteworthy for purposes of analogy that in

venue cases the existence of choice of law provisions is held unimportant. *Hess Oil Virgin Islands Corp. v. U.O.P., Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978); *Artisans Development v. Mountain States Development Corp.*, 402 F.Supp. 1312 (S.D. Ohio 1975); *Atlantic Richfield Co. v. Stearnes-Roger, Inc.*, 379 F.Supp. 869 (E.D. Pa. 1974), and *Breindel v. Levitt & Sons, Inc.*, 294 F.Supp. 42 (E.D.N.Y. 1968).

Not only does the Fifth Circuit's decision in this case create conflict with prior authority, its treatment of the choice of law provision adds an unnecessary and undesirable concept to the due process test. The choice of law provision has been used by the Fifth Circuit as a "counterweight" to offset the effect of traditionally recognized contacts. This is evident at several points in the majority opinion. For example, at 700 F.2d page 1029, the Fifth Circuit noted that although the bargain may have been cemented in Texas, the significance of that jurisdictional fact was diminished by the provision that the agreement be governed and construed according to the laws of the State of Alaska. Later in the opinion, at page 1030, the Court distinguished its decision in the case of *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974) on the grounds that the contract in the instant case provided it was to be governed and construed according to Alaska law. The case of *Southwest Offset, Inc. v. Hudco Publishing Co., Inc., supra*, which also involved a contract concluded in Texas, was distinguished upon the same grounds. Finally, at page 1031 of its opinion, the Fifth Circuit determined the instant case to be analagous to *Owen of Georgia, Inc. v. Blitman*, 462 F.2d 603 (5th Cir. 1972) an interstate contract case where, unlike the case at bar, the contract was not made in the forum state. The Court reasoned that the choice of law provision negated this very important distinction in the jurisdictional facts.

From these statements it is apparent the Fifth Circuit in this case has moved beyond the traditional task of identifying minimum contacts with the forum state and has embarked

upon a new adventure that involves balancing and weighing the contacts that may exist between various jurisdictions. This novel, unprecedented approach undermines the recent efforts of this Court to obtain predictability in cases of this type.

The Fifth Circuit and District Court, in determining whether the exercise of personal jurisdiction comports with due process, should have focused their inquiry on only the relationship between the Defendant and the forum. *Shaffer v. Heitner*, *supra* at 204. It is immaterial that connections might also exist with other jurisdictions. *Gardner Engineering Corp. v. Page Engineering Co.*, 484 F.2d 27, 31 (8th Cir. 1973); *Rosen v. Solomon*, 374 F.Supp. 915, 920 (E.D. Pa. 1974), *aff'd* 523 F.2d 1051 (3d Cir. 1975). Due process does not require that the plaintiff initiate litigation only in the jurisdiction having greatest connection.

The emphasis placed on the choice of law provision in determining the instant case was improper.

C. The holding of the Fifth Circuit creates an unacceptable dilemma in interstate business transactions

The effect of the Fifth Circuit's decision in this case is to place many sellers of goods at the mercy of purchasers in interstate transactions. It is commercially unreasonable for the seller to require full payment of the purchase price before shipment. It is commercially impractical for the seller to travel across state lines to collect accounts of the size here involved, and even larger. The decision in this case accommodates, rewards and, perhaps, encourages interstate misdealing.

It is time that specific, understandable guidelines be developed for gauging the propriety of a court's exercise of *in personam* jurisdiction over persons and entities participating in interstate business transactions. Petitioner submits that in non-consumer, commercial cases jurisdiction should be upheld

in all instances where the plaintiff has made a *prima facie* showing of jurisdictional facts and the defendant is therefore amenable to process. This is manifestly fair in the limited context of non-consumer, commercial transactions, which by their very nature are the result of voluntary, profit-oriented conduct.

IX.

CONCLUSION

This case is illustrative of the inconsistency and confusion that exists among decisions made in the various circuits with respect to the minimum contacts prong of the due process—*in personam* jurisdiction analysis. The detrimental effect of such was recognized by Mr. Justice White in his dissent to the denial of certiorari in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980). After outlining the conflict in existing decisions, Mr. Justice White wrote:

> The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different states. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this court offer no clear guidance on the question.

Id. at 909-911.

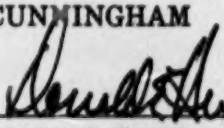
Other courts have expressed similar concern over the need for a clear enunciation of due process—*in personam* jurisdiction principles. In *Wisconsin Electric Mfg. Co., Inc. v. Pennant Products, Inc.*, *supra* at 679, the Seventh Circuit stated: "We appreciate and sympathize with the position of . . . other trial courts, state and federal, that must so frequently decide

an amorphous federal constitutional question . . ." In deciding *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003 (5th Cir. 1982) the Fifth Circuit, noting the "cautionary plea" made in the *Lakeside Bridge & Steel Co., supra* dissent to the denial of certiorari, chose to limit analysis to its own decisions because of the ". . . disarray and differing approaches of several of the other circuits . . ." that had led to inconsistent jurisprudential guidelines. *Id* at 1007. Even the majority opinion in the instant case recognizes the conflict of its decision with that of the Sixth Circuit in *In-Flight Corp. v. Van Dusen Air, Inc., supra*, a factually similar case. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1030 n.6 (5th Cir. 1983).

Clearly this case presents an issue involving conflict in decisions among circuit courts on a point of constitutional dimension, and therefore satisfies the special and important reason for review on certiorari. Petitioner submits that writ of certiorari should issue and, upon review, this Court should reverse the judgments of the District Court and Fifth Circuit Court of Appeals and remand the case for trial on the merits.

Respectfully submitted,

HUDSON, KELTNER, SMITH
& CUNNINGHAM

By 

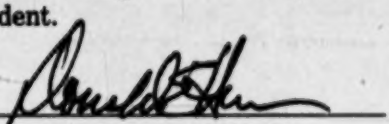
DONALD E. HERRMANN
Texas Bar #09541300
BARBARA P. NEELY
Texas Bar #16236500

2300 Texas American Bank Bldg.
Fort Worth, Texas 76102
Telephone: (817) 336-2300

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the above Petition for Writ of Certiorari was this 22 day of July, 1983 mailed to Mr. John B. McClane, Godfrey, Decker, McMackin, Shipman, McClane & Bourland, 1800 Commerce Building, Fort Worth, Texas 76102, Attorneys for Respondent.



DONALD E. HERRMANN

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-81-225K

HYDROKINETICS, INC., Plaintiff

vs.

ALASKA MECHANICAL, INC., Defendant

ORDER

On this day came to be heard Defendant's Motion to Dismiss, or in lieu thereof to Quash Writ of Summons. The Court, having considered all the pleadings, briefs, and affidavits filed of record, finds it lacks jurisdiction over the person of the Defendant. Hydrokinetics, Inc., as the party seeking to invoke the jurisdiction of a federal court, has the burden of establishing the District Court's jurisdiction over Alaska Mechanical, Inc., and the burden may not be shifted to the party challenging the jurisdiction. *Southwest Offset, Inc. v. Hudco Pub. Co., Inc.*, 622 F.2d 149, 152 (5th Cir. 1980); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490 (5th Cir. 1974). Plaintiff has not carried its burden. While it did make a prima facie showing on the facts of jurisdiction, *Product Promotions, Inc. v. Cousteau, supra*, 495 F.2d at 490-91, when this Court's attention turned to the constitutional considerations of fair play and substantial justice, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), it is determined it

would not be fair and reasonable to require Alaska Mechanical, Inc., as Defendant, to come into Texas and defend this action considering the lack of purposeful activity by the Defendant to avail itself of the privilege of conducting activities within Texas, and to invoke the benefits and protections of its laws. *See Alchemie Intern, Inc. v. Metal World Inc.*, 523 F.Supp. 1039 (D.N.J. 1981); *Communication Equip. v. Municipality of Anchorage*, 498 F.Supp. 632 (M.D. Ala. N.D. 1980). Here, Alaska Mechanical, Inc. is a corporation organized under Alaska laws, is not licensed to do business in the Northern District of Texas, and has no offices, agents, or employees in Texas. The Company works exclusively on projects in Alaska. In this particular case, *Southwest Offset, Inc. v. Hudco Pub. Co., Inc., supra*, 622 F.2d at 151, Defendant had been awarded a subcontract for a U.S. Navy project. It then proceeded to accept bids. The Plaintiff contacted the Defendant and successfully submitted its bid. Subsequently, there were many letters, telexs, and telephone calls made and two incidental trips to Texas by Defendant employees. However, this Court finds as the determining element that the Defendant never made any calculated effort to engage in or solicit business in Texas with a Texas company nor had any expectation of extracting profits. Furthermore, the contract stated it was to be governed by Alaskan laws. Therefore, Defendant's Motion to Dismiss, or in lieu thereof to Quash Writ of Summons, is GRANTED.

IT IS SO ORDERED.

Signed and Entered this 11 day of February, 1982.

/s/ DAVID O. BELEW, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX "B"

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 82-1123

HYDROKINETICS, INC., Plaintiff-Appellant,

vs.

ALASKA MECHANICAL, INC., Defendant-Appellee

In Texas manufacturer's diversity suit for breach of contract against foreign buyer of manufactured goods, the United States District Court for the Northern District of Texas, David O. Belew, Jr., J., granted buyer's motion to dismiss, and manufacturer appealed. The Court of Appeals, Wisdom, Circuit Judge, held that buyer did not purposefully avail itself of privilege of conducting business within Texas or invoke benefits and protections of Texas law so as to warrant exercise of personal jurisdiction.

Affirmed.

Tate, Circuit Judge, dissented and filed opinion.

The question we are asked to decide in this case is whether the exercise of jurisdiction over the person of the defendant under Texas law comports with the basic due process requirements of the United States Constitution. We conclude that it does not, and affirm.

I.

The appellant in this contract dispute, Hydrokinetics, Inc. is a manufacturing concern organized and existing under the

laws of the state of Texas. The appellee, Alaska Mechanical, Inc., is an Alaska corporation engaged in the business of construction contracting. It specializes in the mechanical area, and works exclusively on projects within the state of Alaska. Alaska Mechanical is not licensed to do business in Texas, and has no offices, agents, or employees there.

Alaska Mechanical bid on, and was later awarded, a mechanical subcontract for the United States Navy at Adak, Alaska, which called for it to furnish and install certain waste heat recovery silencer units. Alaska Winter, a manufacturer's representative in Alaska soliciting orders for Hydrokinetics's products, communicated to Alaska Mechanical that Hydrokinetics was interested in supplying these units. Alaska Winter initially brokered all communications between the parties, but the actual contract negotiations were conducted directly between Alaska Mechanical, in Alaska, and Hydrokinetics, in Texas, by telex, telephone and letter. While negotiations were underway, two officers of Alaska Mechanical visited Hydrokinetics's plant to inspect the equipment and facilities.[1] The parties later entered into a final agreement which provided that Hydrokinetics would manufacture and deliver to Alaska Mechanical five waste heat recover silencer units. This agreement took the form of an Alaska Mechanical purchase order, with attached provisions, executed by both parties. The contract stipulated that it was to be governed and construed according to the laws of the state of Alaska.

The waste heat recovery silencer units manufactured by Hydrokinetics were shipped to Seattle, Washington, and later transported to the United States Navy facility at Adak, Alaska. Alaska Mechanical notified Hydrokinetics that in its opinion the goods were unsuitable, and that it was rejecting them. Hydrokinetics sued Alaska Mechanical in federal district court in Texas for breach of contract. Subject matter jurisdiction was based on diversity of citizenship. Hydrokinet-

ics contended that the goods were suitable and had been accepted by Alaska Mechanical.

The district court found that while Hydrokinetics did make a prima facie showing on the facts of jurisdiction,[2]

> when this Court's attention turned to the constitutional considerations of fair play and substantial justice, *International Shoe Co. v. Washington*, 326 U.S. 310 [66 S.Ct. 154, 90 L.Ed. 95] (1945), it is determined it would not be fair and reasonable to require Alaska Mechanical, Inc., as Defendant, to come into Texas and defend this action considering the lack of purposeful activity by the Defendant to avail itself of the privilege of conducting activities within Texas, and to invoke the benefits and protections of its laws. *See Alchemie Intern, Inc. v. Metal World, Inc.*, 523 F.Supp. 1029 [1039] (D.N.J. 1981); *Communication Equip v. Municipality of Anchorage*, 498 F.Supp. 632 (M.D. Ala. N.D. 1980).

Concluding that "the Defendant never made any calculated effort to engage in or solicit business in Texas with a Texas company nor had any expectation of extracting profits,[3] the court granted Alaska Mechanical's motion to dismiss. Our review is limited to the propriety of the district court's finding that it lacked jurisdiction over the person of the defendant.

II.

[1] In *Product Promotions, Inc. v. Cousteau*, 5 Cir. 1974, 495 F.2d 483, 489, this Court held that "[t]he power of a federal court entertaining a suit based on diversity of citizenship to exercise jurisdiction over the persons of non-resident defendants turns on two independent considerations. The law of the state in which the federal court sits must confer jurisdiction over the persons of the defendant, and if it does, the exercise of jurisdiction under state law must comport with basic due process requirements of the United States Consti-

tution". This appeal involves only the latter consideration.[4] In determining whether constitutional due process requirements have been met when a state exercises jurisdiction over the person of a nonresident defendant, we apply a two-pronged test. The "[d]efendant must have some minimum contacts with the state resulting from an affirmative act or acts on its part, and it must not be unfair or unreasonable to require the nonresident defendant to defend the suit in the forum." *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 5 Cir. 1980, 622 F.2d 149, 152 (*citing Product Promotions*, 495 F.2d at 494).

[2, 3] Although jurisdiction over the person of a defendant may be predicated on a single purposeful act of the defendant,[5] "in the determination of whether a foreign corporation should be required to defend itself in a suit in Texas arising out of a contract between it and a Texas corporation, each case must be decided on its own facts." *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 622 F.2d at 151. The number of contacts with the forum state is not, by itself, determinative. "What is more significant is whether the contacts suggest that the nonresident defendant purposefully availed himself of the benefits of the forum state." *Brown v. Flowers Industries, Inc.*, 5 Cir. 1982, 688 F.2d 328, 333 (*citing Quasha v. Shale Dev. Corp.*, 5 Cir. 1982, 667 F.2d 483, 488). "Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the forum from activities outside it, and the relationship between the cause of action and the contacts, relate to whether it can be said that the defendant's actions constitute 'purposeful availment.['] " *Prejean v. Sonatrach, Inc.*, 5 Cir. 1981, 652 F.2d 1260, 1268. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 1958, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1297. "The second prong, or 'fairness' factor, requires the court to consider,

among other things, the interest of the state in providing a forum for the suit, the relative conveniences and inconveniences to the parties, and the basic equities." *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 622 F.2d at 152.

[4, 5] Hydrokinetics does not contest Alaska Mechanical's general lack of contact with the state of Texas; it focuses instead on the facts surrounding the formation of the contract at issue in this case. In support of its contention that Alaska Mechanical purposefully availed itself of the benefits and protections of Texas laws, Hydrokinetics points to the following: (1) Alaska Mechanical agreed to purchase specific goods to be manufactured in Texas; (2) payment for these goods was to be made in Texas; (3) before any written agreement was signed, extensive communications occurred between the parties, originating in Texas and Alaska; (4) officers of Alaska Mechanical traveled to Texas to "close" the deal; and (5) the contract was formally created in Texas because that was the place of the acceptance of Alaska Mechanical's offer by Hydrokinetics.

Several other facts, however, are relevant to an analysis of Alaska Mechanical's activities in this case. Alaska Mechanical does not regularly engage in business in Texas or in any state other than Alaska. Its sole contact with the state of Texas is the single, isolated transaction involved in this case, and that transaction was initiated by and substantially negotiated with the seller's representative in Alaska. The agreement entered into by Alaska Mechanical expressly provided that it was to be governed and construed according to Alaska law. The waste heat recovery silencer units were delivered by Hydrokinetics to Alaska Mechanical in Seattle, Washington.

We agree with the district court's conclusion that Alaska Mechanical did not purposefully avail itself of the privilege of conducting business within Texas or invoke the benefits and protections of Texas law. Although it did agree to purchase goods which it knew were to be manufactured by Hydrokinetics in Texas, no performance by Alaska Mechanical was to take

place in Texas, other than perhaps the payment for the goods. We do not believe that the unilateral activity of Hydrokinetics in Texas satisfies the requirement of contact between Alaska Mechanical and the state of Texas. *See Hanson v. Denckla, supra.*[6] Nor do we weigh heavily the fact that Alaska Mechanical may have mailed payment checks into the forum state in exchange for the goods. *See U-Anchor Advertising, Inc. v. Burt*, Tex.1977, 553 S.W.2d 760, 762, *cert. denied* 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978). Yet we do consider significant that only a single transaction is involved in this case, governed by Alaska law, which is the defendant's sole contact with the forum state. The only performance in Texas was that of the plaintiff, with delivery by Hydrokinetics taking place in the state of Washington. As for the exchange of communications between Texas and Alaska in the development of the contract, that in itself is also insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws. *See Benjamin v. Western Boat Building Corp.*, 5 Cir.1973, 472 F.2d 723, 729, *cert. denied*, 1973, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64. *Accord, Charia v. Cigarette Racing Team, Inc.*, 5 Cir.1978, 583 F.2d 184, 187-88. That officers of Alaska Mechanical twice traveled to Texas to inspect Hydrokinetic's facilities and to resolve the dispute between the parties is relevant, but in this case we do not find it is sufficient to alter the basic quality and nature of Alaska Mechanical's contact with the state of Texas. Although the bargain may have been cemented in Texas when Hydrokinetics accepted Alaska Mechanical's offer, the significance of that is diminished by the provision specifying that the agreement be governed and construed according to the laws of the state of Alaska. We do not hold that the facts relied on by Hydrokinetics in support of its contention that the district court in Texas has jurisdiction over the person of the defendant are not relevant to the determination; we merely con-

clude that, considering the totality of the facts of this case, the necessary inference of purposeful availment is not supported.

Hydrokinetics finds support for its position in *Product Promotions, Inc. v. Cousteau*, 5 Cir.1974, 495 F.2d 483, and *Southwest Offset, Inc., v. Hudco Publishing Co., Inc.*, 5 Cir. 1980, 622 F.2d 149. Although guiding principles may be found in these and other cases, we note several distinctions. In *Cousteau*, the defendant, CEMA, a foreign corporation, entered into a contract to conduct tests of a "fish call" device manufactured by the plaintiff, a Texas corporation, and to mail to the plaintiff in Texas a series of reports and films for its use in television and other advertising promotions. We held that CEMA's activities were adequate to support an inference of an affirmative, purposeful decision by CEMA to avail itself of the privilege of conducting business in Texas, where the transaction was consummated in Texas and required performance by CEMA (the delivery of the product which was the subject of the contract) in Texas. In *Cousteau*, the contract made no mention of the law to be applied, and thus the place where the contract was completed was relevant to the reasonable foreseeability that "enforcement and protection of [defendant's] own rights under the contract might depend on the laws of Texas." 495 F.2d at 497.[7] Here, however, the contract expressly provided that it was to be governed and construed according to Alaska law. Even more important to the holding in *Cousteau*, was that "an integral, essential portion of *CEMA's* performance, delivery of the results in satisfactory form, had to take place in Dallas." *Id.* at 496 (emphasis added). No such performance in Texas was required of Alaska Mechanical under its contract with Hydrokinetics.

In *Southwest Offset*, the defendant, Hudco Publishing, an Alabama company operating in Alabama and Mississippi, placed a series of orders with Southwest, a Texas corporation, "for the 'manufacture' of telephone directories." *Southwest Offset*, 622 F.2d at 152. While the initial order was placed with

the plaintiff's sales representative, which had solicited Hudco's business, in Alabama, subsequent orders were placed by Hudco either in writing or by telephone. Payments were mailed by Hudco to Dallas, as were camera-ready copy of the telephone directories. The books were printed in Texas and shipped to Hudco f.o.b. Dallas. In determining whether the district court in *Southwest Offset* had jurisdiction over the person of the defendant, this Court contrasted the *Cousteau* case with a Texas Supreme Court case, *U-Anchor Advertising, Inc. v. Burt*, Tex.1977, 553 S.W.2d 760, *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978). There the defendant's *only* Texas activity consisted of mailing checks from his place of business in Oklahoma to Amarillo, and the Texas Supreme Court found that the exercise of in personam jurisdiction over the defendant would be offensive to due process. *U-Anchor*, 553 S.W.2d at 763. We concluded that the fact of *Southwest Offset* were closer to the facts of the *Cousteau* case than the *U-Anchor* case, stressing two considerations: first, that Texas was probably the place of most of the contracts and that the defendant could expect that Texas law might govern the enforcement of the contracts; and second, that the defendant was no mere passive customer of the Texas corporation, having repeatedly placed orders with the Texas corporation and several times mailed copy to Texas, "a necessary part of Hudco's contract performance." 622 F.2d at 152. We believe the facts of *Southwest Offset* are distinguishable from those we now confront. Although the final argument may have been reached in Texas, as was the case in *Southwest Offset*, the contract is governed by Alaska law, not Texas law. And unlike the contract in *Southwest Offset*, the agreement here called for no significant performance by the defendant in Texas. Nor does this case involve a repeated series of transactions; instead it involves but one. *See, e.g., Standard Fittings Co. v. Sapag, S.A.*, 5 Cir.1980, 625 F.2d 630, 642 n. 23, *cert. denied*, 1981, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d

299 *(distinguishing Benjamin v. Western Boat Building Corp.*, 5 Cir.1973, 472 F.2d 723, *cert. denied*, 1973, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64, and *Charia v. Cigarette Racing Team, Inc.*, 5 Cir.1978, 583 F.2d 184, on this basis).

Any support Hydrokinetics might find in *Mississippi Interstate Express, Inc. v. Transport, Inc.*, 5 Cir.1982, 681 F.2d 1003, is similarly misplaced. There Mississippi Interstate, a trucking firm, agreed to supply trucks to move goods for Transpo, a California freight broker, on an open account basis. The question this Court faced is identical with the one we now confront: "whether the district court erred in granting the California defendants' motion to dismiss on the basis that retaining jurisdiction in Mississippi would offend these defendants' rights to due process". 681 F.2d at 1003. We concluded that to subject the defendants to jurisdiction within Mississippi would not offend traditional notions of fair play and substantial justice, reasoning that Transpo's extensive commercial activities throughout the United States created an expectation that "such activity could lead to litigation in a distant forum either with plaintiff (as a result of the transactions here involved) or with any of the many parties with whom the defendant routinely dealt in the usual cause of business." The Court went on to note that

> it is both reasonable and just to require lesser forum contacts of a non-resident defendant in the context of the present facts than have been found necessary to sustain jurisdiction over defendants whose activities have, both generally and with respect to the transaction giving rise to the controversy, a more purely local character. To hold otherwise would tend to immunize from suit by anyone with whom they do business, in any but their home jurisdiction, those engaged in nationwide commercial activity who conduct extensive commercial activity in other jurisdictions primarily by telephone or through the mails.

681 F.2d at 1003. Unlike the defendant in *Transpo*, the defendant here did not initiate repeated contacts with the forum state, nor was it engaged in an enterprise similar to brokering interstate trucking services. Its business was purely local in character.

The facts of this case are more closely analogous to those in *Owen of Georgia, Inc. v. Blitman*, 5 Cir. 1972, 462 F.2d 603. In *Blitman*, the non-resident defendants were the builders of a housing project in Boston. After determining their construction requirements, they communicated with a Massachusetts steel fabricator's representative which in turn conveyed the information by telephone to the plaintiff, a steel fabricator. A representative of the plaintiff then traveled to Massachusetts, met with representatives of defendants, and allegedly entered into a contract for the necessary steel fabrication. The work was performed in the plaintiff's Georgia factory, and the steel was shipped f.o.b. to the Massachusetts project. 462 F.2d at 604. Without reaching the question whether an agency relationship between the defendants and the steel fabricator's representative would be sufficient to establish the minimum contacts with the state of Georgia necessary to comport with bare constitutional due process standards, we held that in the absence of proof such contacts were not established. *Id.* As in our case, the defendants knew that they were contracting for fabrication that would be performed in the distant forum. The place of payment was not considered, nor was the presence or absence of any interstate communications. Although in *Blitman* the contract was apparently entered into outside the forum state, whereas the contract here was apparently formed in Texas, we conclude, as already indicated, that the significance of this is diminished by the choice-of-law provision in the Alaska Mechanical-Hydrokinetics contract, and by the facts that the contract called for no significant performance by the defendant in the forum state and delivery to be made by the plaintiff outside the forum. We believe that the additional

fact that representatives of Alaska Mechanical twice traveled to Texas does not sufficiently distinguish the quality and nature of the contract and the defendant's contacts with Texas from the quality and nature of the contract and contacts in *Blitman* to support a holding that the district court had jurisdiction over the person of Alaska Mechanical.

AFFIRMED.

TATE, Circuit Judge, dissenting:

I respectfully dissent. While the majority makes out a persuasive case, I regretfully must differ with its conclusion that federal due process is offended by the exercise of personal jurisdiction in Texas, where the allegedly defective equipment was manufactured at the non-resident defendant's order and in accordance with specifications furnished by it.

As we recently summarized in *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir.1982):

> When a nonresident defendant takes "purposeful and affirmative action," the effect of which is "to cause business activity, foreseeable by [the defendant], in the forum state," such action by the defendant is considered a "minimum contact" for jurisdictional purposes. *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921, 923 (5th Cir.1981). "When a defendant purposefully avails himself of the benefits and protection of the forum's laws — by engaging in activity . . . outside the state that has reasonably foreseeable consequences in the state — maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice." *Prejean v. Sonatrach, Inc.* 652 F.2d 1260, 1268 (5th Cir.1981).

In the present instance, the contract was in the form of a purchase order, by which the Alaska defendant agreed to purchase from the Texas plaintiff the equipment, to be specially manufactured by the Texas plaintiff in Texas in accordance

with the contract specifications furnished by the Alaska defendant. Thus a substantial part of the performance of the contract was contemplated to be (and was) in Texas. Payment for the goods was to be made in Texas. Prior to the conclusion of the written contract, extensive communications occurred between the parties, originating both in Texas and Alaska. The defendant's officers traveled to Texas to close the deal, and the Texas plaintiff accepted the contract terms and executed the writing in Texas.

When the goods were shipped to Alaska after their manufacture in Texas, the Alaska defendant rejected them as unsuitable. From the factual showings, the dispute seems to concern whether the equipment failed to function improperly although manufactured in accordance with the defendant-buyer's specifications (i.e., defective specifications by the defendant) or whether instead the equipment was defectively manufactured. In either event, the Texas locus will furnish a substantial focus of the evidentiary frame of this litigation, with Texas fact witnesses predominating as the source of whether or not the Texas plaintiff properly manufactured the equipment in accordance with the specifications furnished by the Alaska defendant.

In my view, these Texas contacts are sufficient that it is fair and reasonable to require the Alaska defendant to come into Texas and defend the suit. Further, the Alaska defendant is considered to have purposely availed itself of the privilege of conducting activities within Texas since it was reasonably foreseeable that the Texas plaintiff would in fact perform a material part of its contractual obligations within that forum state. *Mississippi Interstate Express, Inc.*, *supra*, 681 F.2d at 1007-08; *Marathon Metallic Building Company v. Mountain Empire Construction Company*, 653 F.2d 921 (5th Cir. 1981); *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 622 F.2d 149 (5th Cir. 1980).

In the event of litigation arising out of the contract, it was reasonably foreseeable that the Alaska defendant might avail itself of the Texas courts either to enforce the contract or to secure a determination that it had been breached and that the witnesses as to the performance or non-performance of the manufacturing contract would in substantial part be available principally in the Texas forum. In my view, it is not unfair or unreasonable to require that defendant to respond in Texas, the most convenient forum for trial of these issues, when it refused to pay for the equipment, as unsuitable, that it caused to be manufactured in Texas according to its specifications, as a result of a contract in part negotiated in Texas and there accepted by the Texas plaintiff.

Accordingly, I respectfully dissent.

FOOTNOTES

[1]After the delivery of the waste heat recovery silencer units, two officers of Alaska Mechanical and Alaska Mechanical's Alaska counsel met with representatives and counsel of Hydrokinetics in Texas to discuss problems relating to the design, construction, and capabilities of the subject waste heat recovery silencer units.

[2]The district court cited that portion of *Product Promotions v. Cousteau*, 5 Cir.1974, 495 F.2d 483, 490-91, where we stated:

> In order to make a prima facie showing of the facts on which jurisdiction was predicated under the contract of the [Texas Long-Arm Statute], . . . appellant had to present prima facie evidence that (1) a contract to be performed in whole or in part [by either party] within Texas existed between itself and appellees and (2) the present suit arose out of that contractual agreement.

[3]The district court also noted that the contract provided that it was to be governed by Alaska law.

[4]This consideration is governed by federal law. *Brown v. Flowers Industries, Inc.*, 5 Cir.1982, 688 F.2d 328, 332; *Terry v. Raymond Int'l, Inc.*, 5 Cir.1981, 658 F.2d 398, 401, *cert. denied*, 1982, 456 U.S. 928, 102 S.Ct. 1975, 72 L.Ed.2d 443; 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075 at 316 (1969).

[5]*See, e.g., McGee v. International Life Ins. Co.*, 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223.

[6]Justices White and Powell dissented to the denial of certiorari in *Lakeside Bridge & Steel Co. v. Mountain State Const. Co.*, 1980, 445 U.S. 907, 909,

100 S.Ct. 1087, 1088, 63 L.Ed.2d 325, and noted that "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealing with a resident plaintiff has deeply divided the federal and state courts."

A particularly thoughtful opinion in which jurisdiction was found in a case factually similar to this one is *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 6 Cir.1972, 466 F.2d 220. Without expressing an opinion as to how we would decide that case were it before us, we note that it is distinguishable from our case in that it involved a nonresident defendant engaged in substantial interstate business. *Id.* at 234. *See Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 5 Cir.1980, 623 F.2d 375; *Mississippi Interstate Express, Inc. v. Transpo. Inc.*, 5 Cir. 1982, 681 F.2d 1003.

[7]The *Cousteau* court further emphasized "the strength of the connection between the contract at issue and the *law* of Texas" in discussing that state's interest in providing a forum for the suit under the second prong of the due process test. *Id.* at 498 n. 27 (emphasis added).

APPENDIX "C"

[U.S. Court of Appeals FILED Apr 27 1983 Gilbert F. Ganucheau Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1123

HYDROKINETICS, INC., Plaintiff-Appellant,

vs.

ALASKA MECHANICAL, INC., Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING
(April 27, 1983)

Before WISDOM, REAVLEY and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/Norman M. Reavley
United States Circuit Judge

[Clerk's Note: See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate]

APPENDIX "D"

U.S.C.A.Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A.Const. Amend. 14, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA MECHANICAL, INC.
P. O. BOX 3-4048
Anchorage, Alaska 99501
Phone: (907) 274-3743

75- 2278

THIS PURCHASE ORDER NUMBER MUST APPEAR ON ALL INVOICES, BILLS OF LADING, PACKING SLIPS & PACKAGES

INVOICE IN TRIPLICATE
TAX NO.
TELEX NO.

DATE ISSUED	REQ. NO.	JOB NAME	JOB NO.	A/C NO.	DATE REQUIRED
4-19-79		Adak - Waste Heat Recovery	75-0073	630	Sept . 30, 1979

To: Revised June 6, 1979
HydroKinetics , Inc. of Fort Worth, Texas
c/o Alaska Winter, Inc.
3901 Spenard Road
Anchorage, Alaska 99503

Ship To:
Alaska Mechanical, Inc.
c/o Aleutian Constructors-Seattle
Contact - Loren Boyer @
(206) 762-4215 for Instructions

TERMS	F.O.B.	SHIP PREPAID VIA
as defined below	Factory F.F.A. Seattle, WA	Truck

PLEASE ENTER OUR ORDER FOR THE FOLLOWING SUBJECT TO TERMS AND CONDITIONS ON THE REVERSE SIDE

1	5 ea	Waste heat recovery silencer units complete and operational to meet all requirements, capacities, etc. as drawn and specified for U. S. Navy (hereinafter referred to as Owner) and their construction contract N 62474-77-C-2680 and clarified herein. SPF Units supplied will comply with all pertinent aspects of NAVFAC Drawings Code Ident. No. 80091 & Specification No. 12-77-2680, & in particular section 15620 of the specifications. except as noted in the provisions herein. SPF		$19,360	$96,800.00
		Total Price this Purchase Agreement			$96,800.00
		The attached "Additional Provisions" pages 1 through 4 are an integral part of this purchase agreement & are to be accepted in whole as part & the same.			
		The five (5) waste heat recovery silencer units covered by this order shall be those identified on the drawings as units No. 6, 8, 9, 10 & 11. SPF			

1. ALL SHIPMENTS MUST BE FULLY PREPAID. ANY TRANSPORTATION CHARGES TO WHICH YOU ARE ENTITLED SHOULD BE ADDED TO YOUR INVOICE WHICH SHOULD ALSO SHOW WEIGHT AND RATES.
2. ATTACH EVIDENCE OF DELIVERY OR SHIPMENT SUCH AS BILLS OF LADING, FREIGHT RECEIPTS OR DELIVERY RECEIPTS TO ORIGINAL COPY OF INVOICE.
3. FORWARD PACKING SLIPS IN EACH SHIPMENT.
4. INVOICES WILL BE RETURNED UNLESS THEY SHOW OUR PURCHASE ORDER NUMBER. STENCIL PURCHASE ORDER NUMBERS ON ALL BOXES AND CARTONS.
5. IF THIS ORDER OR ANY OF ITS CONDITIONS IS NOT CLEAR AND SATISFACTORY TO YOU, COMMUNICATE WITH US AT ONCE. IF PRICES ARE HIGHER THAN SPECIFIED, DO NOT SHIP. NOTIFY US GIVING PRICE ON EACH ITEM.

NOT VALID UNLESS SIGNED BY PURCHASING AGENT

BY Michael D. Golick
PURCHASING AGENT

ORIGINAL

*Addition to Paragraph 2: Said damages or excess costs covered in this paragraph shall be limited to $15,000.

GENERAL CONDITIONS

This order when accepted by the seller either by performance or by his signature, shall constitute a valid and binding contract which shall be governed by and construed according to the laws of the state of Alaska.

2. Time of delivery is the essence of this order. The seller agrees to pay the buyer any damages or excess cost caused by his failure to deliver on time. Incidental and consequential damages caused by the seller will include any damages required to be paid by the buyer to the owner because of the failure of the seller to deliver in accordance with this purchase order. 3. DELETED

4. Title-Inspection-Rightful Rejection. The buyer reserves the right to inspect all goods prior to shipment by the seller and all goods shall be received subject to inspection and approval by the buyer, after delivery. This is notwithstanding any prior payment. The buyer reserves the right to reject any goods not conforming to this order within a reasonable time after buyer would have been able to discover such non-conformity. 30 day time period.

5. All material and equipment furnished under this order shall be guaranteed by the seller against defects in design or manufacture and seller agrees to replace without charge to buyer said material and equipment, or remedy any difficulties latent or patent not due to ordinary wear and tear or due to improper use or maintenance which may develop within one year from date of acceptance by the owner, or within the guaranteed period set forth in the applicable plans and specifications, whichever is longer.

6. Warranties. All material and equipment furnished hereunder shall be in accordance compliance with plans and specifications and general conditions of the contract of buyer with the owner and with any other contractor. Plans and specifications and any technical data referred to in this purchase order shall be deemed to be incorporated herein by reference as if fully set forth. Seller expressly warrants that all material and equipment covered by this purchase order shall produce capacities or meet design specifications and function as called for in the applicable plans, specifications or technical data, as published and warranted by the manufacturer for the equipment involved, and that it will be merchantable, conform to the description of sample furnished the buyer, and fit for the purpose intended. The seller further expressly warrants that the goods sold fully comply with standards promulgated under the Occupational Safety and Health Act of 1970, are free and clear of all liens and encumbrances, and that the seller has good merchantable title. This warranty is an addition to any warranty or service guarantee otherwise offered by the seller or implied by law. This warranty shall survive any inspection, delivery, acceptance, or payment by the buyer. Warranties may be disclaimed or modified only by a separate writing signed by the buyer.

7. The seller shall value and insure the goods at buyer's expense in accordance with buyer's instructions provided the same are received in a reasonable time prior to shipment.

8. The seller hereby agrees to indemnify and hold harmless the buyer from and against all claims, liability, loss, damage or expense, including attorneys' fees, by reason of any action or alleged infringement of letters patent or any litigation based thereon covering any article purchased under this agreement.

9. Seller shall furnish all necessary lien waivers, affidavits, or other documents required to keep the owner's premises free from liens or claims to liens, arising out of the furnishing of material or equipment herein, as payments are made from time to time under this agreement.

10. Neither failure by the buyer to insist upon strict performance of any terms and conditions nor waiver by the buyer of a breach of any provision of this agreement, shall constitute a waiver of any provision or other breach of this agreement. In any legal action between the buyer and seller arising out of this agreement, or for its breach, the buyer shall be entitled to recover a reasonable attorney's fee and its costs and disbursements of said suit at all stages thereof including preparation therefor. Prevailing party

11. All claims for monies due or to become due from the buyer under the terms of this agreement, either by the seller or by his assignees or successor, shall be subject to any setoffs against amounts not yet paid, or counterclaims or defenses of the buyer arising out of this agreement whether before or after assignment by the seller. The buyer reserves the right to make good faith and commercially reasonable modifications and substitutions under this purchase order.

12. Terms. It is understood that the cash discount period will date from the receipt of the invoice or from the actual receipt of the goods, whichever is later, and not from the date of the invoice. On invoices returned for correction, the cash discount period will date from the receipt of the corrected invoice.

13. This order is for immediate shipment unless otherwise stated. Goods ordered under this agreement shall be shipped the cheapest way or as specified.

14. Non-discrimination. Unless this purchase order is exempt in accordance with Section 204 of Executive Order 11246, seller agrees that Executive Order 11246 is hereby incorporated by reference and seller will include the foregoing in every purchase order or subcontract.

15. The seller, by the acceptance of this order, accepts the exclusive responsibility for compliance with any and all state, territorial and federal legislation, or any subdivision thereof, dealing with social security, unemployment insurance, old age pension, or similar legislation, and the payment of any and all taxes, assessments, or charges in connection therewith, whether measured by wages, salaries or other remunerations of seller's employees, or likewise, as far as any of the same may affect the goods, wares, or merchandise covered by this order, and further agrees to indemnify buyer against the assessment of any such taxes or charges applicable to the same.

16. Walsh Healy Act, Fair Labor Standards Act, etc. Seller represents and warrants that all of the goods herein specified will be manufactured or furnished by seller in accordance with all applicable standards, provisions and stipulations of the act of June 30, 1936 (49 Stat. 2036; Walsh Healy Act); act of June 25, 1938 (52 Stat. 1060; Fair Labor Standards Act); act of June 19, 1912 (37 Stat. 137; Eight Hour Law), the act of March 3, 1933 (48 Stat. 1520; Buy American Act); and the act of March 8, 1946 (60 Stat. 37-38; Kickbacks on Contracts); and all amendments thereto. The seller represents and warrants that no price or other charge to the buyer hereunder will be in violation of any price control regulation of the United States Government or executive orders which may be in effect.

17. Other Acts. This purchase order agreement is subject to the following acts and regulations. If a separate certification of compliance is required of the seller by the act, such is to be executed and attached to this agreement.

ADDITIONAL PROVISIONS

Alaska Mechanical, Inc. Purchase Order 75-2278

Ancillary Equipment

Waste heat recovery units shall be supplied uninsulated, painted with red oxide primer. Seller will supply the following for each unit, as per paragraph 3.9 of Section 15620:

1. Pressure Gauge with syphon and shut-off.
2. Two safety valves.
3. Air vent and vacuum breaker.

The blowdown and feed valves called for in paragraph 3.9 Section 15620 will not be supplied by the seller.

Seller's Installation, Start-up and Testing Obligation

Seller shall provide necessary installation instructions for contractor to install the waste heat recovery silencers on jobsite. Seller shall not be required to be at jobsite during installation.

Seller shall further provide "competent manufacturer representative" to observe start-up and testing at jobsite. The contract price includes a single trip and two days on location to observe 40 hours of continuous operation as required in paragraph 5.1 of Section 15620 of the specifications. Any additional time beyond the two days which may be required for reasons other than the representative's time to adjust the equipment shall require an additional payment over the contract price of $350 per day. All required equipment and documentation for start-up and testing shall be supplied by the contractor.

Seller is responsible for all costs associated with transporting said labor to and from Adak, Alaska and will submit required

personal data, for Adak security clearance, at least 15 days prior to representative's arrival at Adak. Alaska Mechanical will, at no cost to seller, supply local Adak surface transportation and room and board for seller's technical representative.

Two units are to ship by September 30, 1979 and the remaining three units by October 30, 1979, based on receiving approval by July 15, 1979.

PRODUCTION SCHEDULE

Seller will provide a factory production and shipping schedule to Alaska Mechanical two weeks after approval, and will update, or verify correctness

ADDITIONAL PROVISIONS (continued) Page 2 of 4

of said schedule, in writing, every two weeks thereafter. If said approval is delayed, delivery schedule is to be changed an equal amount of days.

SHIPPING

One week prior to shipping seller is to contact by phone, Mr. Loren Boyer of Aleutian Constructors at (206) 762-4215 for final shipping address and to convey anticipated dates and carrier. Upon shipping seller is to contact both Mr. Boyer and Alaska Mechanical with complete information on ship date, bill of lading number, carrier (and local contact), number of pieces and estimated time of arrival. Seller shall pay freight to Seattle. Cost of unloading in Seattle and all other charges for shipment from Seattle to jobsite shall be paid by other than the seller. The seller's price does not include any packaging other than that required for truck shipment to Seattle.

DRAWINGS AND PRINTED MATTER

1. Eleven (11) sets of submittal and drawings are required for owner approval.

2. Four (4) sets of "Certified Dimensioned Drawings" locating all openings, connections, mounting bolt holes, physical sizes, etc. are required four weeks after approval.

3. Four (4) sets of installation instructions and any necessary drawings will be required (8) eight weeks after approval.

4. Two (2) preliminary sets of Start-up, Operating and Maintenance instructions are required upon scheduled shipment of the units and eight (8) final sets with parts lists, maintenance schedule recommendations, and special tool list are required no later than six (6) weeks after scheduled shipment.

5. Three (3) copies of all required factory certifications on various tests, welder certification, ASME Code approval, etc. to be mailed upon completion.

6. Four (4) sets of manufacturers *recommendations* on procedures, forms, tests equipment and schedule sequence for all required operational and performance project site tests, will be required two (2) weeks after scheduled shipment.

PAYMENT

Seller shall invoice Alaska Mechanical upon shipment of each unit. Alaska Mechanical shall pay the invoiced amount within 45 days of the invoice date. If payment is not received within the 45 days from Alaska

Mechanical, the bank guarantee letter from Security National Bank shall be effected and payment shall be made by this bank.

WARRANTY

The seller warrants the equipment as defined in the seller's warranty shown in Exhibit A to these terms.

SELLER'S PERFORMANCE OBLIGATIONS

First paragraph under sellers performance obligations is to be revised to "in view of the exacting nature of the performance specification and since it is understood by both parties that variations caused by such things as the accuracy of instrumentation and the amount of heat contained in the exhaust, a disagreement may arise between owner and contractor over capacity of the equipment. Therefore, the contractor agrees to exercise reasonable diligence in cooperation with the manufacturer in pursuing the defense of the product's performance. The contractor does hereby assign to the manufacturer any right the contractor has to defend the product directly against the owner's assertion of failure to meet specification. In the event administrative and judicial remedies against the owner are exhausted and the product is not vindicated, the manufacturer shall bear all direct losses plus costs and attorney fees incurred by the contractor resulting from failure of the product to gain acceptance by the owner.

The limit of the contractor obligation to pursue defense of the product is through the contracting officers decision. Any and all expert witnesses and consulting work shall be provided and paid by the manufacturer."

It is hereby noted that the specification cites two feedwater temperatures to the waste heat recovery silencers. In para-

graph 2.2 (g) of section 15620 the temperature is stated to be 200° F. In paragraph 3.4 of section 15620 the temperature is stated to be 230° F. This order is based on feedwater temperature of 230° F. The waste heat recovery silencers should not be operated with feedwater less than 230° F.

TERMINATION

Termination of this order shall limit the seller to the same rights from Alaska Mechanical as contained in the general provisions of the contract.

Further, if terminated prior to the receipt of official approval Alaska Mechanical will pay the seller an amount equal to the cost of material plus 10%.

ADDITIONAL PROVISIONS (continued) Page 4 of 4

MISCELLANEOUS PROVISIONS

Alaska Mechanical hereby authorizes the seller to purchase materials required for this order as of June 6, 1979.

This order is null and void if the bank guarantee letter referenced above is not received by June 15, 1979 to the satisfaction of the seller.

This order is subject to receiving approval for fabrication by July 15, 1979.

Any delays imposed on the seller will result in an equitable price adjustment.

BANK GUARANTEE

The following stipulations must be included in the letter of guarantee from Security National Bank, Anchorage, Alaska.

A. "We agree to comply with the N/45 terms as set forth in original contract with HydroKinetics, Inc."

B. "Payment to be received on or before 45 days from date of invoicing of each shipment"

C. "This guarantee is irrevocable—no assignment to any successor will effect payment of monies due HydroKinetics after shipment(s) of merchandise as designated in purchase order #75-2278, totaling $96,800, including any additional charges incurred in performance of said contract"

D. "Invoices will be directed to Alaska Mechanical, Inc., and presented directly to Security National Bank, Attention Mr. Barry Dunn for prompt payment as referenced in B. above.

This purchase carries DO-C2 Government Priority Rating

END OF ADDITIONAL PROVISIONS

BY _____ PURCHASING AGENT
ACCEPTANCE _____ BY SELLER

/s/ RE Ward

Exhibit A
Page 1 of 2

LIMITED (1 YEAR) WARRANTY

HydroKinetics, Inc. will repair or replace (at the Company's option) without charge to purchaser, any HydroKinetics product or part which has been used in normal and customary manner and is proven defective within one (1) year from the date it is accepted by the owner but no later than twenty-four (24) months from date of shipment.

In order to obtain service under this warranty, it is the responsibility of the purchaser to promptly notify the Company in writing of the defect in question. The factory will examine the cause of the alleged defect and may at its discretion send its representative to the location of equipment to determine such cause.

If the product or part in question contains no defect covered by this warranty, purchaser will be billed for parts and labor and transportation charged at prices in effect at time of factory examination. Any HydroKinetics product or part not installed or operated in conformity with HydroKinetics instructions or which has been subjected to misuse, misapplication, the addition of certain chemical additives, or other abuse is not covered by this warranty.

Any replaced parts and/or products are warranted only for the remainder of the one (1) year period of this warranty.

HYDROKINETICS, INC. MAKES THIS EXPRESS WARRANTY IN LIEU OF ALL OTHER EXPRESS OR IMPLIED WARRANTIES. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF.

Subject to paragraph 2 of the general conditions, HydroKinetics, Inc. is not liable or responsible to purchaser for any labor, freight charges,

loss of time, nor for any incidental of consequential damages, installation costs or any contingent liability of any kind resulting from the manufacture, sale, installation or use of these parts and products. Company's liability under this contract is limited solely and exclusively to replacement or repair of defective parts or products as stated above.

This contract shall be construed and interpreted under and in accordance with the applicable laws and decisions of the State of Alaska.

RETURNED GOODS

Products and parts may be shipped to the factory, only after obtaining written permission from an authorized representative of the company. All transportation charges must be prepaid by shipper. Material made on special order or obsolete parts not subject to return.